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TENAGA NASIONAL BHD v. DUNIA RAYA ENTERPRISE SDN BHD

COURT OF APPEAL, PUTRAJAYA
TENGKU MAIMUN TUAN MAT JCA
HAMID SULTAN ABU BACKER JCA
B BADARIAH SAHAMID JCA
[CIVIL APPEAL NO: B-02-3159-12-2011]
21 MAY 2015

UTILITIES: *Electricity – Consumption and usage – Claim for loss of revenue –*
C *Tampered meter – Whether meter was in custody of plaintiff – Whether appellant had to prove meters were tampered by respondent – Whether respondent liable to pay for loss of revenue according to s. 38(3) Electricity Supply Act 1990 (ESA 1990) – Whether certified written statement under s. 38(4) ESA 1990 complied with mandatory requirements – Whether appellant could rely on certified written*
D *statement to initiate civil action – Whether appellant independently proved liability as well as quantum*

The plaintiff ('appellant') claimed from the defendant ('respondent') a sum of RM1,386,937.11 and RM487,050.66 related to a back billing which consisted of two accounts. The appellant's claim was based on the premise
E that its meters had been tampered with by the respondents and as such, the respondent was liable to pay for the loss of revenue according to s. 38(3) of the Electricity Supply Act 1990 ('ESA 1990'). As the appellant had disconnected the electricity supply, the respondent had to pay RM250,000 in protest for the supply to be reconnected. The respondent, at the High
F Court, contended that they were not liable to pay for the loss of revenue as the appellant had not proved that the respondent had tampered with the meter. Further, the respondent argued that the meter was in the custody and control of the appellant who had the keys to the locked room in which the meter had been placed. The High Court Judge dismissed the appellant's
G claim and allowed the respondent's counterclaim for the return of RM250,00 that was paid. Hence, the present appeal by the appellants. The respondents, in arguing against the appellant's appeal, submitted that no particulars were given for the purported statement made by the appellant's representatives at any time before the action as well as the trial and only an estimated amended statement was submitted during the trial. In addition, the respondent alleged
H that no certificate pursuant to s. 38(4) of the ESA 1990 was issued and the appellant also did not prove its claim. In consequence, the respondent submitted that the appellant's appeal must be dismissed.

Held (dismissing appeal with costs; deposit ordered to be refunded to respondent)
I **Per Hamid Sultan Abu Backer JCA delivering the judgment of the court:**

(1) Under s. 38 of the ESA 1990, the appellant was not deprived of making a claim against its customers for breach of contract and/or tort for loss of revenue in consequence of a tampered meter. If they do so,

the respondent must prove according to law the liability as well as quantum. However, if the appellant relied on s. 38 of the ESA 1990, they need not prove that the customer had tampered with the meter. It was sufficient if the appellant could show that the meter had been tampered with. (paras 5 & 6)

(2) In terms of quantum, the appellant could rely on the certified written statement to establish their case. To rely on a written statement, the appellant must, *inter alia*, (i) have calculated the loss of revenue and reduced it into a document and written statement; (ii) the certified written statement must contain the particulars stated in s. 38(4) of ESA 1990; (iii) if a proper certified statement was issued, it needed to be served on the respondent and if the respondent did not pay, then civil action could be taken. Thus, it was a condition precedent for the initiation of a civil action in reliance of s. 38 of the ESA 1990 for the appellant to issue a certified written statement according to the law, before civil action could be commenced. (para 6)

(3) On the facts, the purported statement under s. 38(4) of the ESA 1990 did not comply with the mandatory requirement of the law and in consequence, the appellant could not rely on this statement and initiate a civil action. Further, the appellant had not independently proved liability as well as quantum according to law. The trial judge had correctly held that since the keys were at all times with the appellant, the appellant still had to prove that the meters were tampered by the respondent. Just because the meters were in the respondent's premises and it was found to be tampered with, the blame did not fall on the respondent. However, even if there was tampering by the respondent, the appellant had not proved as to how they arrived at the sum claimed. (para 7)

Bahasa Malaysia *Translation Of Headnotes*

Plaintif ('perayu') menuntut daripada defendan ('responden') jumlah sebanyak RM1,386,937.11 dan RM487,050.66 berkenaan dengan bil kebelakangan yang terdiri daripada dua akaun. Tuntutan perayu adalah bahawa meternya telah diusik oleh responden dan oleh itu, responden adalah bertanggungjawab untuk membayar kehilangan pendapatan mengikut s. 38(3) Akta Bekalan Elektrik 1990 ('ESA 1990'). Oleh kerana perayu telah memberhentikan bekalan elektrik, responden terpaksa membayar RM250,000 dalam bantahan untuk bekalan tersebut disambung semula. Responden, di Mahkamah Tinggi, menegaskan bahawa mereka tidak bertanggungjawab untuk membayar kehilangan pendapatan kerana perayu tidak membuktikan bahawa responden telah mengusik meter tersebut. Di samping itu, responden menghujahkan bahawa meter tersebut berada di dalam jagaan dan kawalan perayu yang mempunyai kunci bilik yang dikunci di mana meter tersebut telah diletakkan. Hakim Mahkamah Tinggi menolak

tuntutan perayu dan membenarkan tuntutan balas responden bagi pemulangan RM250,000 yang telah dibayar. Oleh itu, rayuan ini oleh perayu. Responden, dalam hujahannya terhadap rayuan perayu, menegaskan bahawa tiada butir-butir yang diberikan untuk penyataan yang dibuat oleh wakil-wakil perayu pada bila-bila masa sebelum tindakan serta perbicaraan dan hanya kenyataan dipinda yang dianggarkan telah dikemukakan semasa perbicaraan. Tambahan lagi, responden juga mendakwa bahawa tiada sijil menurut s. 38(4) ESA 1990 dikeluarkan dan perayu juga tidak membuktikan tuntutannya. Akibatnya, responden berhujah bahawa rayuan perayu harus ditolak.

Diputuskan (menolak rayuan dengan kos; deposit diperintahkan agar dipulangkan kepada responden)
Oleh Hamid Sultan Abu Backer HMR menyampaikan penghakiman mahkamah:

(1) Di bawah s. 38 ESA 1990, perayu tidak dihalang dari membuat tuntutan terhadap pelanggannya untuk pelanggaran perjanjian dan/atau tort untuk kehilangan pendapatan akibat daripada meter yang diusik. Jika mereka berbuat demikian, responden mesti membuktikan mengikut undang-undang liabiliti dan kuantum. Walau bagaimanapun, jika perayu bergantung kepada s. 38 ESA 1990, mereka tidak perlu membuktikan bahawa pelanggan tersebut mengusik meter. Ia adalah mencukupi jika perayu boleh menunjukkan bahawa meter tersebut telah diusik.

(2) Dari segi kuantum, perayu boleh bergantung kepada kenyataan bertulis yang diperakui untuk membuktikan kes mereka. Untuk bergantung kepada satu kenyataan bertulis, perayu hendaklah, antara lain, (i) mengira kehilangan pendapatan dan direkodkan ke dalam dokumen dan penyataan bertulis; (ii) penyataan bertulis yang disahkan perlu mengandungi butir-butir yang dinyatakan dalam s. 38(4) ESA 1990; (iii) jika pernyataan yang disahkan dikeluarkan, ia perlu disampaikan kepada responden dan jika responden tidak membayar, maka tindakan sivil boleh diambil. Oleh itu, adalah satu syarat terlebih dahulu untuk memulakan tindakan sivil dengan bergantung pada s. 38 ESA 1990 untuk responden mengeluarkan kenyataan bertulis yang disahkan mengikut undang-undang, sebelum tindakan sivil boleh dimulakan.

(3) Berdasarkan fakta, kenyataan yang dimaksudkan di bawah s. 38(4) ESA 1990 tidak mematuhi keperluan mandatori undang-undang dan akibatnya, perayu tidak boleh bergantung kepada kenyataan ini dan memulakan tindakan sivil. Di samping itu, perayu tidak membuktikan secara bebas liabiliti dan kuantum mengikut undang-undang. Hakim bicara telah membuat dapatan dengan betul bahawa oleh kerana kunci tersebut berada pada setiap masa dengan perayu, perayu masih perlu membuktikan bahawa meter tersebut telah diusik oleh responden. Hanya kerana meter tersebut berada di premis responden dan ia didapati

diusik, responden tidak boleh disalahkan. Walau bagaimanapun, jika terdapatnya pengusikan oleh responden, perayu tidak membuktikan bagaimana jumlah yang dituntut dicapai.

Case(s) referred to:

Koperasi Pegawai-Pegawai Kerajaan Negeri Perlis Berhad v. Wan Kiah @ Wan Noriah Mahat & Another [2013] 1 LNS 750 CA ***(refd)***

Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal [2015] 5 CLJ 955 CA ***(refd)***

Legislation referred to:

Electricity Supply Act 1990, ss. 38(3), (4), (5)

For the appellant - Alvin John (Puteri Noorsyazana Zainal, Vishnukumar & Mohd Rizal Yaakub with him); M/s Alvin John & Partners

For the respondent: Lye Wing Voi (Yap Hsu-Lyn with him); M/s Lye & Yap

[Appeal from High Court, Shah Alam; Civil Suit No: MT6-22-377-2009]

Reported by Sandra Gabriel

JUDGMENT

Hamid Sultan Abu Backer JCA:

[1] The appellant/plaintiff appeals against the decision of the learned High Court Judge in refusing to allow the claim related to 'tampered meter' and allowing the respondent's/defendant's counterclaim for the return of RM250,000 paid to the appellant under protest.

Brief Facts

[2] The facts of the case and issues have been set out in the 15 page judgment of the learned trial judge and also in the submissions of the parties. We do not wish to repeat save to summarise as follows:

(i) the appellant claims its meters has been tampered and the respondent customer has to pay for the loss of revenue, etc. as per s. 38(3) of the Electricity Supply Act 1990 (ESA 1990);

(ii) the respondent says the meter was in the custody and control of the appellant who had the keys to the locked room in which the meter has been placed; and in consequence they are not liable as the appellant has not proved the respondent has tampered the meter;

(iii) the appellant has disconnected the electricity supply and in consequence the respondent had paid RM250,000 in protest for the supply to be reconnected;

(iv) the appellant's claim related to the back billing which consist of two accounts namely: (i) RM1,386,937.11 and (ii) RM487,050.66. As the respondent has paid under protest RM250,000, the appellant's claim is limited to RM1,623,987.77, as per the statement of claim;

(v) the respondent says no particulars were given for the purported statement made by the appellant's representatives at any time before the action as well as trial and only an estimated amended statement was submitted during the trial. The respondent also alleges that no certificate pursuant to s. 38(4) was issued according to law and the appellant also ordinarily did not prove its claim according to law and in consequence the appeal must be dismissed. Further, the respondent says s. 38 was not pleaded in the statement of claim.

[3] The appellants claim is anchored on s. 38 of ESA 1990 which reads as follows:

> 38. (1) Where any person employed by a licensee finds upon any premises evidence which in his opinion proves that an offence has been committed under section 37(1), 37(3) or 37(14), the licensee or any person duly authorised by the licensee may, upon giving not less than twenty-four hours' notice, in such form as may be prescribed, cause the supply of electricity to be disconnected from the said premises.
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> (1A) Notwithstanding any other provisions in this Act, where a police officer not below the rank of Assistant Superintendent applies to a supply authority or a licensee for the disconnection of the supply of electricity to any premises for a period not exceeding one calendar month under section 21A of the Common Gaming Houses Act 1953 [Act 289], the supply authority or the licensee or any person authorised by the supply authority or the licensee shall immediately disconnect or cause the supply of electricity to be disconnected from those premises.
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> (2) If the supply of electricity has been disconnected under subsection (1), it shall not be reconnected until the licensee at his discretion gives permission for reconnection:
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> Provided that the period of disconnection shall not exceed three months.
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> (2A) Notwithstanding subsection (2), if the supply of electricity has been disconnected under subsection (1A), it shall not be reconnected without the written permission of a police officer not below the rank of Assistant Superintendent.
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> (3) The licensee may require the consumer to pay him for the loss of revenue due to the offence committed under subsections 37(1), 37(3) and 37(14) and any expenses incurred by the licensee under this section including expenses incurred in respect of the reconnection of electricity supply.
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> (4) A written statement by an employee of the licensee duly certified by the licensee or any person authorised by the licensee specifying:
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> (a) the amount of loss of revenue or the expenses incurred by the licensee; and
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> (b) the person liable for the payment thereof, evidence of the payment that has to be made by the consumer under subsection (3) shall be *prima facie*.

(5) The amount stated in the written statement shall, within the period specified in the statement, be due and payable to the licensee and in default of payment such amount shall be recoverable by civil action in a court.

Jurisprudence Relating To Section 38

[4] The coram consisting of Balia Yusof bin Haji Wahi JCA, Hamid Sultan bin Abu Backer JCA and Badariah binti Sahamid JCA had the opportunity to deal with similar issues in the case of *Tenaga Nasional Bhd v. Ternakan Air Wui Kyee Sdn Bhd & Another Appeal* [2015] 5 CLJ 955 (Civil Appeal No: A-02-572-2011) and *Tenaga Nasional Berhad v. Ee-Lian Plastic Industries (M) Sdn Bhd* (Civil Appeal No: P-02(NCVC)(W)-201-01-2013) in detail. For good measure, this judgment must be read with that to avoid repetition. What was held by the Court of Appeal in both cases abovementioned can be briefly summarised as follows:

(i) conviction is not necessary to claim under s. 38 ESA 1990;

(ii) Tenaga need not prove that the consumer tampered with the meter to succeed under s. 38;

(iii) section 38(3) to (5) only gives some evidential advantage to Tenaga and does not discharge the legal burden to prove its claim when quantum as well as liability is challenged. Once challenged by way of credible evidence, then the trial court is obliged to do a balancing act to see whether Tenaga has discharged the legal burden. The Court of Appeal held as follows:

> If the action is to be based purely on contract and/or tort, then Tenaga cannot rely on the statutory statement under section 38(4) of which will stand as *prima facie* evidence of quantum of loss of revenue. If section 38(4) is relied upon, it does not stop the defendant from challenging quantum as well as liability. Sections 38(3) to (5) only give some evidential advantage to Tenaga and do not discharge the legal burden to prove its claim when quantum as well as liability is challenged.

[5] What is important to note under s. 38 is that, Tenaga is not deprived of making a claim against its customers for breach of contract and/or tort for loss of revenue in consequence of a tampered meter. If they do so they must prove that the customer tampered with the meter and in consequence Tenaga suffered loss of revenue. That is to say Tenaga must prove according to law the liability as well as quantum.

[6] However, if Tenaga relies on s. 38, they need not prove that the customer tampered with the meter. It is sufficient if they can show that the meter has been tampered. In terms of quantum they can rely on certified

written statement to establish their case. That does not mean the respondent cannot challenge the quantum. For the appellant to rely on a written statement, the following must have taken place:

(i) the appellant must have calculated the loss of revenue and reduce it into a document and written statement;

(ii) an employee and/or duly authorised person of the appellant must have perused the document as well as the written statement to certify the written statement;

(iii) the certified written statement must contain the particulars stated in s. 38(4) of ESA 1990;

(iv) for a valid certificate, the name of the employee or authorised person of the appellant must appear in the statement and duly signed;

(v) if a proper certified statement is issued, it needs to be served on the customer and if the customer does not pay, then civil action can be taken. Thus, it is a condition precedent for initiation of civil action in reliance of s. 38 for Tenaga to issue a certified written statement according to law, before civil action can be commenced;

(vi) it must also be noted that as a matter of procedural fairness which is part of our constitutional guarantees, the appellant must provide details of the statement if so requested by the respondent. (See *Koperasi Pegawai-Pegawai Kerajaan Negeri Perlis Berhad v Wan Kiah @ Wan Noriah Mahat & Another* [2013] 1 LNS 750). If details of statement is not provided for, it will in ordinary course create hardship to the respondent to object to the statement and/or part thereof, if the respondent so wishes. Failure to produce the details to the statement will be in breach of rules of procedure and if it is produced for the first time during trial the court is obliged not to admit the said document. Support for the proposition is found in a number of cases and we do not think it is necessary to reproduce it here.

[7] We have read the appeal record and the able submissions of the parties. After much consideration to the submissions of the appellant, we take the view that the appeal must be dismissed. Our reasons, *inter alia*, are as follows:

(a) In the instant case, we have perused the appeal record and the purported statement under s. 38(4) ESA 1990 and we are satisfied that it does not comply with the mandatory requirement of the law.

(b) On the face of the record, the purported written statement under s. 38(4) does not satisfy the requirement of the said section and in consequence, the appellant cannot rely on this statement and initiate a civil action.

(c) We have also perused the documents and evidence to see whether the appellant has independently proven liability as well as quantum, according to law. These too the appellant had not done. The finding of the learned trial judge is helpful on this issue and reads as follows:

> (b) Whether the Plaintiff had proven the quantum claimed
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> [8] Given that the meters were tampered, the plaintiff would still have to prove that the defendant had done it. But since all their witnesses had plainly stated that the keys were at all times with TNB, the plaintiff still have to prove that the meters were tampered by the defendant. Just because the meters were in defendant's premises and it was found to be tampered the blame does not fall on the defendant. The plaintiff still has to prove that the meters were tampered by the defendant. To the point of risking repetition, how could the defendant tamper with the meters when at all times the keys to the padlock were in the custody and control of the plaintiff. On this alone the court dismissed the plaintiff's claim.
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> [9] However, even if there was tampering by the defendant, the plaintiff had not proven as to how they arrived at the sum claimed. The plaintiff's witness SP5, Puan Fareha binti Mohd Zainal had tendered Exhibit P16 i.e. Back Billing Summary for month of June 2006 up to February 2008. However, she did not explain to the court how she derived at that figure of RM1,386,937.11. When asked by the court about the calculation and corrected figures, she referred to the various graphs and other documents at Exhibit P20 (pages 76-96 of Bundle B). She did not explain how she arrived at those figures and how the various documents (graphs) were to be read. She cursorily answered the court but did not give any real explanation to guide the court to look at those documents at P20. Defence counsel submitted that a statement at Exhibit P17 (page 119 Bundle B) are mere estimates because at the bottom of the page where it is signed by Fareha bt Mohd Zainal, the words printed next to the signature read:
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> > Anggaran pengiraan dibuat oleh
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> Therefore the defence counsel submitted that it was abundantly clear that Exhibit P17 is mere estimates. Further, this document had been certified by one Vasantha Devi Periyanan and Zulfaqar Mamat. Neither of them had been called to testify on the amounts they had certified. The court agrees with the defence counsel that these are mere estimates.
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> [10] As I had stated earlier there was hardly any evidence led to explain to the court how the graphs and the Exhibits P16 and P17 are to be read, understood and interpreted. In the case of *Guan Soon Tin Mining Co. v. Wong Fook Kum* [1969] 1 MLJ 99, the Federal Court said:
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> > The respondent, as plaintiff, of course had to discharge the burden of proving both the fact and the amount of damages before he could recover. Where he succeeded in proving

A neither fact nor amount of damage he must lose the action or, if a right was infringed, he would recover only nominal damages. Where he succeeded in proving the fact of damage, but not its amount, he would again be entitled to an award of nominal damages only. This statement of the law is concisely stated in *Mayne & McGregor on Damages* (12th Ed.) para 174. For its practical application I would quote Lord Goddard C.J. in *Bonham-Carter v. Hyde Park Hotel Ltd*:

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> Plaintiffs must understand that if they bring actions for damages it is for them to prove their damage; it is not enough to write down the particulars and so to speak, throw them at the head of the court, saying, "This is what I have lost: I ask you to give me damages.' They have to prove it.

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[11] Similarly in this case, the plaintiff has to proof the amount and I find that the plaintiff failed to do. In fact, to borrow the words of Lord Goddard in the above case, the plaintiff in our case had written down the particulars and so to speak throw them at the head of this Court saying "This is what I have lost: I ask you to give me these damages."

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E [12] On this, again the plaintiff failed to prove the sum claimed on a balance of probability.

[8] For reasons stated above we do not find any merits in this appeal. This appeal is dismissed with costs of RM50,000 to the respondent. Deposit is to be refunded.

F We hereby order so.

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